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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	
	)	
RAINBOW BROADCASTING COMPANY	)	GC Docket No. 95-172
	)	File No. BMPCT-910625KP
For an extension of time	)	File No. BMPCT-910125KE
to construct	)	File No. BTCCT-911129KT
	)	
and	)	
	)	
For an assignment of its	)	
construction permit for	)	
Station WRBW(TV), Orlando, Florida	)	

TO: The Commission

CONSOLIDATED EXCEPTIONS AND BRIEF OF PRESS BROADCASTING COMPANY, INC.

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May 16, 1997

SUMMARY

This case involves applications seeking extension of a construction permit for a television station. Those applications were filed in 1991. In those applications, Rainbow Broadcasting Company ("RBC"), the permittee/applicant, claimed that it was financially qualified and "ready, willing and able" to construct. RBC attributed its failure to construct to an otherwise undescribed "dispute" with its tower owner which had, according to RBC, "delayed" construction.

However, the record of this proceeding demonstrates that the "dispute" which RBC referred to was in fact a lawsuit which RBC itself had brought against its tower owner. Moreover, that lawsuit did not involve any prohibition against construction of RBC's station. Rather, in the words of the presiding U.S. District Judge, the purpose of RBC's suit was to "prevent competition" from another television licensee seeking to upgrade its facilities (pursuant to Commission authorization).

Any suggestion that RBC's Tower Litigation prevented RBC from constructing was plainly false, as the record evidence establishes. RBC itself conceded herein that it could indeed have proceeded to construct, irrespective of the lawsuit, and the available documentary evidence further supports that. Accordingly, RBC's contrary claim, in its applications, was a misrepresentation (or, at the very least, a woeful lack of candor). Similarly, since RBC's failure to construct was attributable to RBC's own voluntary decision (which was based on RBC's concern about what it perceived to be an adverse competitive environment in which its station, if constructed, would be "worthless"), it cannot be said that

RBC's extension applications could have satisfied the rigorous requirements of Section 73.3534 of the Commission's Rules and precedent thereunder.

Further, while RBC held itself out to the Commission, in its extension applications, as being financially qualified, it was holding itself out in the Tower Litigation -- at precisely the same time -- as being without any financing at all. Clearly, RBC was either lying to the District Court, or it was lying to the Commission.

And finally, the record evidence underscores the conclusion of the Court of Appeals in *Press Broadcasting Company, Inc. v. FCC*, 59 F.3d 1365 (D.C. Cir. 1995) that, in soliciting and engaging in *ex parte* communications, RBC "could not reasonably have believed the proceeding to unrestricted" within the meaning of the Commission's *ex parte* rules. 59 F.3d at 1370. That being the case, it must be concluded that RBC intentionally violated those rules.

In his Initial Decision, the Administrative Law Judge resolved the issues in this proceeding in favor of RBC. In doing so, however, he ignored substantial uncontradicted evidence which completely undermined his conclusions, he relied on findings which are not themselves supported by any record evidence at all, and he reached conclusions which are contradictory to, and precluded by, the Court's decision in *Press*. Because of the serious legal and factual errors infecting the Initial Decision, that decision must be reversed.

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Pursuant to Sections 1.276 and 1.277 of the Commission's Rules, Press Broadcasting Company, Inc. ("Press") hereby submits its Exceptions to the *Initial Decision* ("*I.D.*"), 12 FCC Rcd 4028 (ALJ 1997), of Administrative Law Judge Joseph Chachkin ("ALJ") in the above-captioned proceeding. As set forth below, the ALJ's decision completely ignores substantial, undisputed evidence which contradicts and/or undermines the conclusions reached by the ALJ with respect to each of the designated issues. Additionally, the *I.D.* is based in certain respects on findings which are not supported by the record, and the ALJ's conclusions in certain respects are contradictory to, and precluded by, the previous decision in this matter of the U.S. Court of Appeals for the District of Columbia Circuit in *Press Broadcasting Company, Inc. v. FCC*, 59 F.3d 1365 (D.C. Cir. 1995) ("*Press*"). Accordingly, the *I.D.* must be reversed.

CONCISE STATEMENT OF THE CASE

This proceeding arose in 1991, with the filing of above-captioned application of Rainbow Broadcasting Company ("RBC") for extension of its construction permit for Station WRBW(TV), Orlando, Florida. That application was initially denied by the Video Services Division, but that denial was reversed by the Mass Media Bureau, whose action was affirmed by the Commission. *Rainbow Broadcasting Company*, 9 FCC Rcd 2839 (1994). That decision, in turn, was reversed by the Court of Appeals in *Press*, which remanded the matter for further agency proceedings. The Commission, in turn, designated the captioned RBC applications for hearing on the following issues:

> (a) To determine whether [RBC] intentionally violated Sections 1.1208 and 1.1210 of the Commission's *ex parte* rules by soliciting a third party to call the Commission on [RBC]'s behalf, and by meeting with Commission staff to discuss the merits of [RBC]'s application proceedings.

(b) To determine whether [RBC] made misrepresentations of fact or was lacking in candor with respect to its financial qualifications regarding its ability to construct and initially operate its station, in violation of Sections 1.17 and 73.1015 of the Commission's rules or otherwise. [1/]

(c) To determine whether [RBC] made misrepresentations of fact or was lacking in candor regarding the nature of the tower litigation in terms of its failure to construct in connection with its fifth and sixth extension applications, in violation of Section 73.3534(b) of the Commission's rules or otherwise. [1/]

(d) To determine whether [RBC] has demonstrated that under the circumstances either grant of a waiver of Section 73.3598(a) or grant of an extension under Section 73.3534(b) is justified.

(e) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether [RBC] is qualified to be a Commission licensee and whether grant of the subject applications serves the public interest, convenience and necessity.

Memorandum Opinion and Order and Hearing Designation Order ("HDO"), 11 FCC Rcd 1167 (1995). Press was made a party to the case, and a Separate Trial Staff was designated by the General Counsel to represent the Commission.

In the *I.D.* the ALJ resolved all issues favorably to RBC and granted the captioned applications.

STATEMENT OF THE QUESTIONS OF LAW PRESENTED

Since both the Court of Appeals and the Commission concluded that there were substantial and material questions of fact which had to be addressed before any of the above-captioned applications could be granted, was it not error to allow RBC (and its successor, Rainbow Broadcasting, Limited ("RBL")) to continue as if those applications had in fact been granted?

Since the record established that RBC could have constructed its television station irrespective of the "dispute" with the owner of its tower, did not the ALJ err in concluding that (a) RBC did not engage in misrepresentation or lack of candor when

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[1/] Pursuant to an Erratum, DA 96-156, Mimeo No. 61019, originally released December 15, 1995, subsequently re-released in corrected form on February 12, 1996, the text of this issue was corrected to read as set forth above.

RBC represented that it had been precluded from constructing by that "dispute" and (b) RBC was entitled to an extension of its construction permit?

Since the record established that RBC was representing to the Commission that it was financially qualified and "ready, willing and able" to construct at precisely the same time that it was representing to the U.S. District Court in Miami that RBC had no financing and would not be able to secure any financing, and since the record further established that RBC was in fact unwilling to proceed with construction at precisely that time, did not the ALJ err in concluding that RBC did not engage in misrepresentation and lack of candor with respect to its financial qualifications?

Since the record established that RBC engaged in *ex parte* communications concerning its applications and since the record also established that RBC could not reasonably have believed that those applications were not subject to the Commission's prohibition against such *ex parte* communications, did not the ALJ err in concluding that RBC did not intentionally violate the *ex parte* rules?

ARGUMENT

I. The Failure to Unwind the Transaction and Require Cessation of Operations.

1. Prior to the flawed (*see Press*, 59 F.3d at 1370) grant, in 1993, of RBC's captioned extension and assignment applications, RBC had not constructed its station, had not commenced operation, and had not consummated its proposed assignment of the permit to RBL. Pursuant to the 1993 grant, RBC did consummate the assignment, and the station was thereafter constructed and operation commenced. But while those actions were being undertaken, Press was pursuing its appeal of the underlying grant. Thus, RBC's actions were taken at the parties' risk that the grant might be reversed. *E.g., Teleprompter Corp.*, 50 Rad. Reg. 2d (P&F) 125, 127 (CATV Bur. 1981); *Improvement Leasing Co.*, 73 FCC2d 676, 684 (1979), *aff'd, Washington Ass'n for Television and Children v. FCC*, 665 F.2d 1264 (D.C. Cir. 1981).

2. Press's appeal was in fact successful, and the Court (and, ultimately, the

Commission) concluded that substantial and material questions existed with respect to the above-captioned applications; hence, the instant hearing was designated. But under Section 309 of the Communications Act, that designation means that the above-captioned applications could not have been deemed to have been granted. That being the case, actions taken by RBC (and/or RBL) in reliance on the earlier agency action should have been "unwound", the assignment should have been rescinded, and the station should have been ordered off the air pending final resolution of this proceeding. *Folkways Broadcasting Co., Inc. v. FCC*, 379 F.2d 447, 449 (D.C. Cir. 1967).

3. In the *HDO*, the Commission declined to order the station off the air. That was error. Under *Folkways*, temporary continuation of service in these circumstances is warranted "only when there are 'extraordinary circumstances requiring emergency operations in the public interest'." No such extraordinary circumstances were presented here. [2/] Since the *HDO* did not address the question of the RBC/RBL assignment application, Press raised that question with the ALJ. By *Memorandum Opinion and Order*, FCC 95M-29, rel. March 7, 1996, the ALJ denied Press's petition for rescission of the grant of the assignment. That, too, was error. Under Section 309 and *Folkways*, it is clear that an application as to which substantial and material questions of fact have been raised cannot be deemed to be granted, and without a grant, the parties cannot act as if there has been a grant. Accordingly, pending final resolution of this proceeding, RBC (and RBL) must be required

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[2/] The sole justification offered in the *HDO* for leaving the station on the air -- "[d]isruption of . . . service . . . would not serve the public interest" -- is essentially identical to the justification offered by the Commission, and ***rejected by the Court***, in *Folkways*. *See* 379 F.2d at 449 (sole justification offered by Commission was that "it is axiomatic that the continued operation of an existing station is in the public interest").

to return themselves to the status quo ante, *i.e.*, the status quo as of June, 1993. While such a result may be inconvenient for RBC and RBL, that is a risk which they willingly undertook when they elected to rely on agency actions which were still non-final and subject to appeal.

II. The Failure to Construct Misrepresentation Issue

4. RBC's construction permit was extended in July, 1990 through January, 1991. Jt. Exh. 1, ¶8. In order to obtain any further extension, RBC had to demonstrate that its failure to construct was attributable to reasons clearly beyond RBC's control. 47 C.F.R. §73.3534. In an extension application filed January, 1991, RBC sought to meet that burden by claiming that

> [a]ctual construction has been delayed by a dispute with the tower owner which is the subject of legal action in the United States District Court for the Southern District of Florida (Case No. 90-2554 CIV MARCUS).

Jt. Exh. 2, p. 3. Contrary to the ALJ's conclusion, the record establishes that RBC's claim was a blatant misrepresentation wholly lacking in candor, since RBC knew that it could have constructed irrespective of the referenced "dispute".

5. The "dispute" was a lawsuit ("the Tower Litigation") which ***RBC*** had initiated [3/] against Guy Gannett Publishing Co. ("Gannett"), the owner of the tower on which RBC's antenna was to be mounted. [4/] RBC's purpose in bringing the Tower

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[3/] The fact that RBC had initiated the suit was not disclosed in RBC's extension application. While the ALJ asserted that RBC's application "leaves no doubt that the legal action was brought by RBC", *I.D.* at n. 10, the ALJ's claim is simply wrong, as review of RBC's application (Jt. Exh. 2) demonstrates.

[4/] In its suit (*Rey v. Guy Gannett Publishing Co.*, 766 F. Supp. 1142 (S.D. Fla. 1991)), RBC sought to enjoin Gannett from renting space on the tower to Press. RBC claimed that RBC's lease was "exclusive". However, presiding U.S. District Judge Stanley Marcus -- after a full evidentiary hearing -- concluded unequivocally that no such right had ever even been mentioned during the RBC/Gannett lease negotiations, much less bargained for or

(continued...)

Litigation was "to prevent competition" from Press. 766 F. Supp. at 1149. [5/] The evidence in the instant proceeding conclusively demonstrated that (a) neither the Tower Litigation nor the circumstances underlying it prevented RBC in any way either from constructing its station while the suit was pending or (if the lawsuit were thought to preclude construction) from dismissing the lawsuit in order to proceed with construction, and (b) RBC was well aware of this.

6. Rey testified during the Tower Litigation that he knew that RBC could, as of December, 1990 (almost two months ***after*** the lawsuit was filed), have installed its equipment. Press Exh. 17. Rey affirmed the accuracy of that earlier testimony before the ALJ. Tr. 856. The ALJ failed to mention this evidence, much less address it. Rey further testified:

> Q: Is it true that if [RBC] had dismissed [the Tower Litigation] you could have proceeded with construction?
>
> Rey: Yes, that's true. . . .

[4/](...continued)
included in the RBC/Gannett lease. Judge Marcus found that the lease, on its face, was ***non***-exclusive. *E.g.*, 766 F. Supp. at 1146-47.

[5/] The Tower Litigation was but one element of RBC's across-the-board effort to prevent Press from upgrading the facilities of its own station in the Orlando market. Press had, since 1988, been seeking authority to "swap" channels in that market, and RBC had opposed Press's efforts every step of the way. *See Amendment of Section 73.606(b) (Clermont and Cocoa, Florida)*, 4 FCC Rcd 8320 (MMB 1989), *aff'd*, 5 FCC Rcd 6566 (1990), *aff'd sub nom. Rainbow Broadcasting Company v. FCC*, 949 F.2d 405 (D.C. Cir. 1991). RBC's appeal to the Court of Appeals in that matter was filed in December, 1990, just a month after RBC initiated the Tower Litigation. RBC's desire to "prevent competition" was unmistakable.

Tr. 888. [6/] Even in its proposed findings, RBC conceded its ability to construct:

> [p]erhaps RBC could have moved more swiftly had it pulled the plug on the [Tower Litigation], but such an action would have compromised its place in the market and abrogated rights to which it was entitled.

RBC Proposed Findings at 57-58.

7. This evidence conclusively establishes that, contrary to the position advanced in RBC's extension application, RBC was ***not*** prohibited from constructing by forces beyond its control. By its own repeated admission, RBC ***could*** have proceeded with construction, either during the litigation or by dismissing the litigation. [7/] RBC was well aware of that fact when it represented otherwise in its January, 1991 extension application. That contrary representation was, therefore, a misrepresentation. The ALJ's failure even to mention, much less to address, this evidence was error to which Press excepts.

8. Moreover, the ALJ's decision in favor of RBC was based on claims which

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[6/] Mr. Rey explained that, had RBC dismissed its suit against Gannett, RBC's permit would have been "worthless" and Mr. Rey "would have chosen maybe to give it back to the FCC". Tr. 888. *See also* Tr. 872, where Mr. Rey reaffirmed this:

> [It] was my belie[f] . . . in December of 1990, January of 1991, that it would have been worthless for Press to have been the fifth station and we would have been the sixth station. . . . And until recently, the litigation ended, and we decided to go forward. Things had changed, some had not, but we were willing to go forward.

Thus, RBC felt, as of January, 1991, that it would be "worthless" to go forward with construction, but by June, 1991 (when RBC's request for injunction had been denied by Judge Marcus), "things had changed" and RBC only then "decided to go forward".

[7/] RBC could have constructed, but RBC *chose not to*. *E.g.*, Tr. 888. RBC's reluctance to construct was based on Rey's belief in January, 1990 -- a belief about which he testified repeatedly and consistently throughout the hearing -- that RBC's permit would be "worthless" if Press were to operate from the Gannett tower. *Id.* *See also* Tr. 780-81, 790, 872, 916, 989.

were ***not*** supported by the record evidence. RBC claimed that a Status Quo Order [8/] issued by Judge Marcus had prohibited Gannett from undertaking the construction necessary for RBC's installation. While the ALJ appears to have credited this notion, *see I.D.* at ¶79, the record does not support it.

9. It is undisputed that, in a letter dated July 17, 1991, a Gannett official advised Rey that, between December, 1990 and July, 1991 -- *i.e.*, the period during which RBC claims Gannett did not construct because it was prohibited from constructing -- Gannett had in fact been moving forward with the construction process. Press Exh. 7. In other words, the evidence establishes that the Status Quo Order did ***not*** stop Gannett from proceeding with construction. The ALJ failed to acknowledge or address this evidence. Instead, he stated (without citing any evidence) that "it would appear that Gannett was barred by the court from constructing . . . while the status quo order was in force". *I.D.* at ¶79. This quasi-conclusion [9/] is contrary to the evidence and must be reversed.

10. RBC also claimed that RBC could not construct because Gannett would not cooperate or communicate with RBC. The ALJ credited this claim. *I.D.* at, *e.g.*, ¶79. [10/]

[8/] When asked what had prevented RBC from constructing its station after August, 1990, Rey initially claimed that, during a November, 1990 prehearing conference in the RBC/Gannett suit, Judge Marcus had issued an oral order (the "Status Quo Order") which prevented RBC from constructing. Tr. 732, 803-805, 830. The claim that RBC might have been prevented from constructing by the Status Quo Order was abandoned, however, after Press introduced into evidence a transcript of that conference which conclusively demonstrated that Judge Marcus had ***not*** thereby precluded RBC from constructing. Press Exh. 16; Tr. 840.

[9/] The ALJ's statement is plainly less than conclusive (note the tentative introductory phrase "it would appear").

[10/] In so doing, the ALJ suggested that Press might have somehow been to blame for some refusal by Gannett to construct for RBC's benefit. *I.D.* at, *e.g.*, ¶79. Press takes extreme

(continued...)

But, again, the record contradicts that claim. The evidence demonstrates that RBC first notified Gannett of RBC's intent to go forward with construction in mid-August, 1990, in a letter from Rey seeking certain information from Gannett. RBC Exh. 7, p. 2. That information was provided by Gannett in less than two weeks. RBC Exh. 7, p. 8. Rey then requested a meeting with Gannett officials to clarify certain points. *Id.* By letter dated September 19, 1990, Rey confirmed that such a meeting had been held, that Gannett had provided the additional requested information, and that Rey was to get back to Gannett with information concerning RBC's needs. RBC Exh. 7, p. 9.

11. But the record discloses no further correspondence from Rey to Gannett until June, 1991. Instead, in early October, 1990, RBC began to threaten litigation if Gannett entered into a lease with Press. RBC Exh. 7, p. 10. And in early November, 1990, RBC filed suit against Gannett. Press Exh. 9. Thus, the record demonstrates that, from August, 1990, Gannett was wholly cooperative with RBC, but it was Rey who failed to provide information which he had said he would provide in September, and it was RBC which sued Gannett in early November.

12. On November 26, 1990, notwithstanding the pendency of the suit brought by RBC, Gannett wrote to Rey again seeking information concerning the construction to be undertaken for RBC. Press Exh. 7; Tr. 869. Rey did not respond to that request until July, 1991. *Id.* Rey acknowledged receiving the November, 1990 letter from Gannett; he also acknowledged that he elected not to respond to it because "answering that letter would have

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[10/](...continued)
exception to any suggestion that Press may have colluded with Gannett to keep RBC from constructing its station. There is no record evidence at all to support that suggestion, and Press submits that the ALJ's unsupported speculation is both unwarranted and inappropriate and should be stricken.

made [RBC's] position in the [tower] litigation obsolete." Tr. 869.

13. So contrary to the ALJ's findings, the record reflects that any lack of communication between RBC and Gannett from November, 1990-July, 1991 was the result of RBC's voluntary election, not any refusal by Gannett to communicate with RBC.

14. In addition to all of the evidence discussed above, the record is replete with testimony from Rey establishing again and again that, in January, 1991 -- when RBC was representing to the Commission that it was "ready, willing and able" to build but for the "dispute" -- Rey and RBC in fact had absolutely no desire to construct because, as matters then stood, Rey was convinced that RBC's permit was at that point "worthless". *E.g.*, Tr. 780-81, 790, 872, 888, 916, 989. This underscores the gravity of RBC's misrepresentation: not only was RBC not precluded from constructing by the Tower Litigation, but RBC itself affirmatively did not want to construct.

15. Broadcasters are held to "high standards of punctilio" and must be "scrupulous in providing complete and meaningful information to the Commission". *The Lutheran Church/Missouri Synod*, 12 FCC Rcd 2152, 2163 (1997). In view of the facts and circumstances reflected in the record, it is clear that RBC engaged in intentional [11/] misrepresentation (or, at a bare minimum, egregious lack of candor) in its claims concerning its failure to construct. In resolving the Tower Construction Misrepresentation issue favorably to RBC, the ALJ ignored evidence which established conclusively that RBC had engaged in misrepresentation, and he ignored evidence which contradicted the unsupported

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[11/] Of course, intent can be inferred from facts and circumstances in the record, particularly where a "motive or logical desire to deceive" is apparent. *See, e.g., Black Television Workshop of Los Angeles, Inc.*, 8 FCC Rcd 4192, 4198, n. 41 (1993).

and unsupportable latterday version of the facts which RBC advanced (and which the ALJ accepted). Accordingly, the ALJ's resolution of this issue must be reversed and RBC must be found to have engaged in misrepresentation with respect to its failure to construct.

III. The Section 73.3534/73.3598 Issue

16. A permittee seeking extension of its permit must demonstrate that its failure to construct is attributable to circumstances clearly beyond the permittee's control ***and*** that the permittee has taken all possible steps to resolve such impediments. 47 C.F.R. §73.3534. The record plainly demonstrates that RBC failed to meet these standards.

17. In its January, 1991 extension application, RBC stated that construction had "been delayed by a dispute with the tower owner". Jt. Exh. 2. That was all that RBC said to justify its failure to construct. But the record demonstrates that that "dispute" did ***not*** prevent RBC from constructing. *See, e.g.*, ¶¶5-12, above. And even if the lawsuit could, *arguendo*, be deemed to have had such an effect, the record also demonstrates that RBC could have avoided that supposed effect simply by dismissing the lawsuit. Tr. 888; RBC Findings at 57-58. Thus, RBC's failure to construct during the August, 1990-July, 1991 construction period was exclusively within RBC's control.

18. Further, the record demonstrates that RBC chose not to construct during August, 1990-July, 1991 because of RBC's concern about the unfavorable competitive climate which RBC believed (according to Rey's repeated testimony) would have rendered RBC's permit "worthless". *E.g.*, Tr. 888.

19. It is well-established that private, independent business judgments (such as the desire to avoid competition) are ***not*** a valid justification for failure to construct. *E.g., New Orleans Channel 20, Inc.*, 100 FCC 2d 1401 (MMB 1985), *application for review denied*,

104 FCC 2d 304, 313 (1986), *aff'd sub nom. New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361 (D.C. Cir. 1987); *Community Service Telecasters, Inc.*, 6 FCC Rcd 6026 (1991); *Panavideo Broadcasting, Inc.*, 6 FCC Rcd 5260 (1991); *Carolyn S. Hagedorn*, 11 FCC Rcd 1695, ¶20 (1996); *Deltaville Communications*, 11 FCC Rcd 10793, ¶12 (1996); *Kin Shaw Wong*, 11 FCC Rcd 11928 (1996); *Chester P. Coleman*, 12 FCC Rcd 3330, ¶10 (1997). [12/] Since the avoidance of competition is the ***only*** reason for RBC's voluntary failure to proceed with construction, RBC failed to satisfy the requirements of Section 73.3534.

20. Similarly, RBC failed to satisfy the requirement that an applicant for a permit extension must demonstrate that it has taken "all possible steps to expeditiously resolve" any impediments to construction. 47 C.F.R. §73.3534. The record demonstrates that RBC took no such steps at all. [13/] To the contrary, RBC created the "impediment" (*i.e.*, the suit

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[12/] It must also be noted that the source of Rey's delay -- *i.e.*, the competitive environment in the Orlando television marketplace -- was clearly known to Rey and RBC well in advance of November, 1990. *See, e.g.*, Tr. 765 (Rey testifies that he was aware of the possibility of a "sixth station" in the market as early as 1985). RBC can therefore not claim that the basis for its failure to construct was somehow unforeseen or unforeseeable.

[13/] The ALJ concluded that RBC had taken "all possible steps". *I.D.* at ¶127. In reaching that conclusion, the ALJ referred only to RBC's entering into a tower lease, making payments under the lease, planning a transmitter building and selecting equipment. *Id.* But the lease was entered into in 1986, RBC Exh. 6, p. 1, well before the August, 1990-January, 1991 extension period relevant here. *See, e.g., Golden Eagle Communications, Inc.*, 6 FCC Rcd 5127, ¶10 (1991) (Commission will consider only construction progress made during most recent construction period). As to lease payments, the record is devoid of any showing of what, if any, payments may have been made during the relevant period. The planning of the transmitter building appears to have occurred in May, 1990 (*see* dated drawings included in RBC Exh. 7, pp. 3-7), well before the relevant construction period. And as for equipment selection, Judge Marcus found, in June, 1991, that as of then RBC had not selected any transmission equipment at all, 766 F. Supp. at, *e.g.*, 1148; and according to RBC, in November, 1991, it was then supposedly ***still*** engaged in equipment selection, Jt. Exh. 5. Thus, the ALJ's conclusion is without record support.

against Gannett) which it now says prevented it from constructing. [14/] Further, even assuming *arguendo* that RBC believed that Judge Marcus's Status Quo Order somehow prevented RBC from constructing, RBC never sought any relief from Judge Marcus, Tr. 852-55, and RBC failed to dismiss the litigation, Tr. 888. And even when, in the midst of (and notwithstanding) the litigation, Gannett requested information aimed at facilitating construction, Rey declined to provide that information for more than seven months. Tr. 869. It cannot legitimately be said that RBC took "all possible steps" as required by Section 73.3534.

21. In his discussion of the Section 73.3534/73.3598 Issue, the ALJ devoted considerable attention to the question of whether RBC had a full 24 months in which to construct. *I.D.* at, *e.g.*, ¶¶91, 126. But that question was disposed of by the Court of Appeals, which concluded that, irrespective of when RBC's permit was initially issued and irrespective of any subsequent appeals, in January, 1991 "[RBC] was unquestionably required to apply and qualify for an extension" and make the showing required by Section 73.3534. Press, 59 F.3d at 1372. The Court's conclusion in that regard has long since become final and is the law of the case. *See, e.g., Northwestern Indiana Tel. Co. v. FCC*, 872 F.2d 465, 471 (D.C. Cir. 1989). As a result, the ALJ could not permissibly consider that matter at all here. While the precise weight accorded by the ALJ to this factor is not clear from the *I.D.*,

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[14/] In its Proposed Findings, RBC acknowledged that it could have proceeded with construction had it dismissed the suit against Gannett. RBC Proposed Findings at 57-58. But RBC attempted to excuse its failure to do so by claiming that dismissal of the suit would have "compromised its place in the market and abrogated rights to which it was entitled." *Id.* Preservation of any particular "place in the market" is ***not*** a valid justification for non-construction, *e.g., New Orleans Channel 20, Inc. v. FCC, supra*, and according to Judge Marcus, RBC was entitled to no right of exclusivity at all (assuming that that is the right to which the Proposed Findings refer).

the fact that it was included at all is contrary to the Court's decision. [15/]

22. The Court of Appeals held that RBC was subject to the requirements of Section 73.3534. The record compiled herein establishes that RBC failed to meet those requirements in its original application, Jt. Exh. 2, and RBC failed even to show, *post hoc*, that it could have satisfied them. [16/] Accordingly, having failed to satisfy Section 73.3534, RBC's extension applications must be denied.

IV. The Financial Qualification Misrepresentation Issue

23. In its January, 1991 extension application, RBC represented that it was financially qualified and "ready, willing and able" to build its station. Jt. Exh. 2. But

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[15/] In addressing this issue, the ALJ also relied upon *Channel 16 of Rhode Island, Inc. v. FCC*, 440 F.2d 266 (D.C. Cir. 1970). But in that case a permittee asserted that the Commission's failure over an extended period to adopt certain industry-wide regulatory policies could justify a waiver or further extension based on certain broad "catch all" language in the Commission's rules as then codified. Here, there has been no extended uncertainty about any industry-wide regulatory policy. And the "catch all" language of the rules has since been eliminated, replaced by a strict policy prohibiting extensions of construction permits absent the "one-in-three" showing required by Section 73.3534. *See Broadcast Construction Periods*, 102 FCC2d 1054 (1985). And any uncertainty which might *arguendo* have existed concerning the validity of RBC's initial construction permit had completely disappeared, when grant of RBC's permit became final, *i.e.*, ***before*** RBC's failure to construct.

[16/] Commission precedent requires that an applicant for a permit extension provide, in its extension application, a full and complete explanation for its failure to construct. *Hagedorn*, 11 FCC Rcd at 1696, ¶12 ("an applicant must either take the initiative to present its case fully and completely at the outset, or bear the risk that its showing will be found inadequate."). RBC's initial application offered virtually no explanation for its failure to construct. Jt. Exh. 2. And despite the fact that Press first questioned the validity of RBC's initial showing in February, 1991, and litigated it continuously thereafter, the Commission's records demonstrate that RBC never offered any elaboration on that showing until 1996, in the course of this hearing. Under *Hagedorn*, any explanation proferred at this late date by RBC was too late by years and should have been rejected. Nevertheless, as discussed above, the explanation(s) which RBC did ultimately advance were themselves wholly inadequate in light of the requirements of Section 73.3534 and cases decided thereunder.

simultaneously, in the Tower Litigation, RBC was representing precisely the contrary to Judge Marcus. *E.g.*, Press Exh. 9; *see* 766 F. Supp. 1142. In attempting to show that it would be irreparably harmed (an essential showing in an action for an injunction), RBC alleged that, absent an injunction, RBC would not be able to construct its station because it would not be able to secure financing. [17/] Thus, in its lawsuit against Gannett, RBC had every incentive to try to prove that it in fact had financial backing, but that it would lose that backing absent an injunction.

24. Testifying before Judge Marcus, Rey indicated that RBC had had "conversations" with a potential financing source. Press Exh. 10, p. 16. Asked about the terms of any possible financing, Rey testified, in January, 1991, only that Conant wanted to obtain a minority ownership position in RBC in return for his supposed financing. *Id.* at 13-14. However, Rey also testified that "everything had been put on hold" and that Conant had told him that "the likelihood is that he will not finance the station" if Press were to be allowed on the Gannett tower. *Id.* at 6-9. This testimony was given at precisely the same time that Rey was advising the Commission that RBC was financially qualified and "ready, willing and able" to construct.

[17/] RBC averred, under oath, that if the injunction were denied and Press were allowed on the Gannett tower,

> [RBC] will be unable to secure financing to build and operate the station. . . .
>
> [RBC]'s ability to compete in the Orlando television market will be obstructed to the point that it will not be able to secure the financing to build a television station for Channel 65 or any other tower in the area. . . .
>
> No financing will be available to build and operate [RBC's] station, given that it is not economically viable, and the station will never be built.

Press Exh. 9, pp. 12-14. RBC did ***not*** allege that it would lose financing previously committed to it; rather, RBC alleged that it would be "unable to secure financing".

25. Judge Marcus concluded that RBC had no financing whatsoever. 766 F. Supp. at 1145. RBC did not appeal that decision.

26. In early 1991, Press brought to the Commission's attention RBC's claims before Judge Marcus. *E.g.*, Press Exh. 13. Press alleged that those claims demonstrated that RBC was financially unqualified. In response, RBC did ***not*** defend itself (as it does now) by claiming that financing was available from Conant; rather, RBC offered the cryptic assertion that "[n]othing precludes Rainbow from availing itself of alternative financing, a common occurrence for new stations." RBC Opposition (filed March 12, 1991) to Press Petition for Reconsideration, at 7. The implication, of course, was that, notwithstanding the apparent unavailability of financing from Conant (which was evidenced by Rey's testimony before Judge Marcus and which RBC's cryptic response appeared to concede), RBC had "alternative financing" available.

27. RBC maintained that position through five years of continuous litigation before the Commission and the Court of Appeals. It was not until 1996, in the course of this hearing, that RBC suddenly claimed that all along it had had a detailed oral understanding with Conant, complete with elaborate terms designed to secure repayment. [18/] But RBC still offered no explanation for the obvious inconsistencies between its claims before Judge

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[18/] Supposedly, Mr. Conant was to provide up to $4 million, in return for which he was to receive: (a) repayment over a five-year period, in equal monthly installments, at 2 percent over prime; (b) 50 percent of the station's net cash flow for five years; (c) 25 percent of the station's net cash flow for every year after the first five years of operation; (d) 10 percent of the net sale price if the station were to be sold; (e) a security interest in the station's assets, subject only to any prior interest that might be held by an equipment supplier; (f) the personal guarantees of Mr. Rey and Leticia Jaramillo, another principal of RBC. Rainbow Exh. 4, p. 2; Tr. 693-694; 751-752. In its summary of the terms, the *I.D.* omits reference to the last two. *I.D.*, n. 5.

Marcus and its claims before the ALJ.

28. For example, while RBC now claims that RBC and Conant had in late 1990 discussed elaborate terms and conditions (*see* Footnote 16, above), Rey's January, 1991 testimony concerning the terms of the supposed Conant financing failed to mention ***any*** of those terms or conditions. Similarly, while RBC now contends that financing was at all times available from Conant, Rey's testimony before Judge Marcus clearly contradicts that notion: in January, 1991, Rey testified that Conant's supposed commitment had been placed "on hold" by Conant, Press Exh. 10, p. 7; RBC now contends that Conant never put his supposed commitment "on hold", Tr. 926-27. [19/] Gone now, too, is the notion of the availability of "alternative financing" to which RBC referred in its pleadings to the Commission in 1991.

29. In adopting RBC's claims, the ALJ failed to acknowledge or address these inconsistencies and contradictions between Rey's sworn testimony before Judge Marcus and his sworn statements to the Commission. That failure was error. [20/] Similarly, the ALJ

[19/] Rey's current claim is also contradicted by Conant, who acknowledged in a sworn declaration that Conant told Rey, in December, 1990, that Conant would "take a wait and see attitude". RBC Exh. 4, p. 1. On the witness stand, Conant seemed to move away from that statement, claiming instead that he had ***not*** taken a "wait and see" approach, Tr. 691. Confronted (by the ALJ) with his own declaration, however, Conant seemed to retreat back to his declaration, Tr. 693 ("It's [my declaration] and I'll stand on it.").

[20/] Those inconsistencies and contradictions make clear that RBC was, at minimum, either lying to Judge Marcus or lying to the Commission. Those inconsistencies and contradictions are especially remarkable in view of the fact that Rey testified about the terms of his "understanding" with Conant before Judge Marcus in January, 1991, just one month after Rey's discussion about that "understanding" with Conant. Under those circumstances, Rey's recollection of the terms of the "understanding" would normally be expected to be more accurate in January, 1991 than five and a half years later. And yet, RBC would have the Commission believe that Rey is now able to recall complex details which he did not even mention or allude to in 1991. Similarly, in 1991 Rey testified that Conant had told him, one

(continued...)

failed to acknowledge or address other inconsistencies and contradictions within RBC's claims concerning the supposed Conant financing. For example, in his declaration Conant sought to lend credibility to the extraordinary notion that he would agree to lend RBC $4,000,000 on a handshake by claiming that he was "well acquainted" with RBC's principals and that he had had some "past financial relationship" and "past business experiences and relationships" with them. RBC Exh. 4. But, cross-examined about these claims, Conant admitted that he had in fact ***never*** had ***any*** financial relationship with either RBC principal and that his "business experiences" were limited to a less-than-two-year period (in 1982-84) during which Rey was an employee of a Miami television station; Conant (who resided in Chicago) was a limited partner in that station's licensee, exercised no executive duties relative to the station, and did not supervise Rey. Tr. 663-64. [21/]

30. The ALJ also failed to address the fact that, while Rey claimed to be "intimately familiar" with Conant's financial situation (*see* RBL Findings at 46), Rey's testimony disclosed that at most, Rey had some sense that, in approximately 1983, Conant's net worth was supposedly in excess of $10 million. Tr. 748-49. But under well-established precedent, such a net worth would not be sufficient to support a $4 million loan commitment. *Coastal Bend Family Television, Inc.*, 94 FCC2d 648, 656, ¶12 (Rev. Bd. 1983).

31. A further inconsistency in RBC's claims which the *I.D.* ignores involves Rey's state of mind concerning the availability of the Conant "commitment" in January, 1991.

[20/](...continued)
month earlier, that Conant's "loan" was "on hold", Press Exh. 10, p. 7; before the ALJ Rey testified, incredibly, that Rey must have mixed things up back then, because Rey now thinks that Conant didn't say anything was "on hold", *e.g.*, Tr. 926-927.

[21/] Conant also testified that, contrary to his declaration, he had no business experience at all with Leticia Jaramillo, RBC's other principal. Tr. 659.

According to Rey's 1996 testimony, Rey believed that Conant had committed to financing RBC, but only if Rey believed that construction and operation of RBC's station was viable. *E.g.*, Tr. 918, 922, 924-25. But Rey also testified, repeatedly, that from at least December, 1990 through approximately June, 1991, he believed that it would be "worthless" for RBC to construct its station. *E.g.*, Tr. 780-81, 790, 872, 888, 916, 989. Thus, since Rey did not believe in the viability of the station at that time, he could not have believed that Conant's supposed "commitment" was then valid and reliable. And yet, at precisely that time -- January, 1991 -- Rey represented to the Commission that RBC was in fact financially qualified and that it was ready, willing and able to construct.

32. The evidence clearly demonstrates that RBC has been less than truthful and candid in its representations concerning its supposed financial qualifications. In reaching his conclusion favorable to RBC, the ALJ simply ignored the substantial evidence which contradicts and undermines that conclusion. The ALJ's resolution of the financial misrepresentation issue was erroneous and must be reversed.

V. The Ex Parte Issue

33. The *Ex Parte* Issue was designated to determine whether RBC intentionally violated the Commission's *ex parte* rules. The evidence establishes that RBC did intentionally violate those rules.

34. According to the Commission and the Court of Appeals, at least two separate *ex parte* violations occurred in late June-early July, 1993 -- the first involving conversations with Mass Media Bureau ("Bureau") officials initiated at RBC's request by Antoinette Cook Bush ("Bush"), the second involving a meeting, also initiated at RBC's request, between RBC representatives and Mass Media Bureau officials. *Rainbow Broadcasting Company*,